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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALTER LEWIS GRAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

DEC 21 1967

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Walter Lewis Gray was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on November 30, 1966, in Case No. 36861-CD [C.T. 2]. ^{1/} The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to Perform Civilian Work Assignment.

On December 12, 1966, appellant was arraigned before the

^{1/} "C. T. " refers to Clerk's Transcript of Record.

Honorable A. Andrew Hauk, United States District Court Judge and entered a plea of not guilty. Appellant was represented by retained counsel at all stages of the proceedings. On February 6, 1967, a jury trial commenced before the Honorable Jesse W. Curtis, United States District Court Judge. The decision was continued until February 13, 1967, on which date the appellant was found guilty. On March 20, 1967, appellant was sentenced to the custody of the Attorney General for a term of 3 years [C. T. 32]. A timely notice of appeal was filed on March 28, 1967 [C. T. 33].

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, Section 462 and Title 18, United States Code, Section 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES AND REGULATIONS INVOLVED

Title 50 Appendix, United States Code, Section 462, provides in part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces

or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect to refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both. . . ."

32 C. F. R. §1624. 1(a) provides:

"Every registrant, after his classification is determined by the Local Board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the Local Board designated for the purpose if he files a written request therefor within ten days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such ten-day period may not be extended. "

32 C. F. R. §1625. 2 provides in pertinent part as follows:

"The Local Board may reopen and consider anew the classification of a registrant . . . provided, . . . the classification of a registrant shall not be reopened after the Local Board has mailed to such registrant an order to report for induction (SSS Form

252) . . . unless the Local Board first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant has no control. "

32 C. F. R. §1625.4 provides in pertinent part:

"When a registrant . . . files with the Local Board a written request to reopen and consider anew the registrant's classification and the Local Board is of the opinion that the information accompanying such a request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the Local Board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. . . ."

32 C. F. R. §1642.2 provides in pertinent part:

"When it becomes the duty of a registrant . . . to perform an act or furnish information to a Local Board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty. "

III

STATEMENT OF FACTS

At the time of the trial of this case, a photographic copy of the official Selective Service System file of this appellant was offered and admitted into evidence as Government's Exhibit No. 1 [R. T. 5]. ^{2/} This file and the testimony of appellant during the trial revealed the following facts with respect to appellant's registration status in the Selective Service System.

Defendant registered at Local Board No. 111, Los Angeles, California, on October 21, 1963 (pages 1 and 2). ^{3/} On June 16, 1964, Local Board No. 111, hereinafter referred to as the Board, received a completed Classification Questionnaire (SS Form 100) in which the defendant requested to claim status as a conscientious objector (pages 4-10 at page 7). On July 6, 1964, the Board received a completed special form for conscientious objector (SSS Form 150) (pages 15-18).

On July 9, 1964, the Board by a vote of 3-O classified the defendant 1-A. On the same date, a notice of this classification was mailed to the defendant (SSS Form 110) (page 11). On July 17, 1964, the Board received a letter from the defendant requesting a personal appearance (page 19). On August 12, 1964, the defendant appeared before the Board. The defendant at this time indicated

^{2/} "R. T. " refers to Reporter's Transcript of Record.

^{3/} Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

that he was not a regular pioneer but presently is serving in the capacity of a vacation pioneer which he performs approximately six months of the year and works the remaining six months. The defendant requested a classification in Class 4-D. The registrant also indicated that he could not accept civilian work in lieu of induction as it would be against his conviction (page 21).

On August 12, 1964, the Board again classed the defendant in Class 1-A by a vote of 3-O (page 11). A notice of this classification was again mailed to the defendant (page 11). On August 21, 1964, the Board received a letter from the defendant indicating his desire to appeal his classification (page 24). Attached to the letter of August 21, 1964, the defendant enclosed a further memorandum indicating again that he was at present a vacation pioneer minister and had applied for status as a full-time minister (page 11).

On September 17, 1964, the Board forwarded the defendant's file to the Appeal Board (page 11). On October 29, 1964, the Appeal Board tentatively determined that the registrant should not be classified in I-O or a lower class and forwarded the file to the Department of Justice (page 11). On July 21, 1965, the Department of Justice wrote the Appeal Board and recommended that the defendant's claim as a conscientious objector should be sustained and that he be classified in Class I-O (pages 29-33). On September 30, 1965, the Appeal Board by a vote of 3-O classified the defendant in Class I-O (page 35). On October 8, 1965, notice of this classification was mailed to the defendant (SSS Form 110) (page 11).

On October 19, 1965, the Board received a letter from the

defendant stating his intent to appeal his classification in Class I-O, and his desire to be placed in Class 4-D (page 36). At that time, the defendant indicated he averaged a total of 18 hours per month to the ministry (page 36). On October 25, 1965, the Board wrote the defendant indicating "that you do not have the right to appeal the decision of the Appeal Board inasmuch as there was no dissenting vote in their decision". The Board further indicated that if the defendant received a permanent pioneer appointment verification of this status should be reported to the Local Board at which time consideration of the defendant's classification would again be reviewed (page 38).

On November 23, 1965, the defendant was ordered for an armed forces physical examination to be given on December 10, 1965 (page 39). The defendant reported on December 10, 1965 for his physical examination at which time he was found acceptable for service (pages 40-51). On January 24, 1966, the Board received an incomplete special report for Class I-O registrants (SSS Form 152) in which the defendant failed to indicate three types of civilian work he would be willing to perform in lieu of induction. Attached to the form the defendant affixed a note in which he stated, "I am unable to pick any type of civilian work to perform because I feel that I cannot in accordance with ministerial training . . .". The defendant further added that he feels that he is entitled to a 4-D ministerial exemption (pages 52-56).

On January 28, 1966, the Board wrote the defendant a letter setting forth three types of civilian work acceptable in lieu of

induction (page 59). No reply to the letter of January 28, 1966 was received from the defendant (page 61). On April 29, 1966, the Board wrote the defendant requesting that the defendant meet with the Board on May 10, 1966 for the purpose of reaching an agreement as to the type of civilian work which should be performed by the defendant in lieu of induction (page 63). On May 10, 1966, the defendant met with representatives of the Local Board. At this time the defendant was shown a list of work available to him in lieu of induction. The defendant stated that he could not accept any of them, and indicated that he expected to receive his appointment as a pioneer within the next month (page 64).

On June 22, 1966, the Board mailed to the defendant an order to report for civilian work and statement of employer (SS Form 153). The order indicated that the defendant should report to the Board on July 19, 1966 where he would be given instructions to proceed to the Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California (page 72). On July 19, 1966, the defendant reported to the Local Board where he was given a letter of instructions to report to the Los Angeles Department of Charities, 1200 North State Street, Los Angeles, California, not later than July 20, 1966 for work as an institutional helper (pages 70-71). On July 19, 1966, defendant reported to the Los Angeles Department of Charities, 1200 North Spring Street, Los Angeles, California, and there refused any and all positions assigned (page 72).

IV

QUESTIONS PRESENTED

1. At the time appellant was ordered to perform a civilian work assignment, he was properly classified I-O.
2. Appellant was properly ordered to perform a civilian work assignment.

V

ARGUMENT

1. AT THE TIME APPELLANT WAS ORDERED TO PERFORM A CIVILIAN WORK ASSIGNMENT, HE WAS PROPERLY CLASSIFIED I-O.
-

The appellant's contention is essentially as follows:

"The evidence shows appellant presented a prima facie case for a IV-D classification (minister's status). No contrary evidence, if any existed, was ever placed in the file. Therefore, he should have been classified in Class IV-D. It was incumbent on the board to place adverse evidence in the file, as a justification for rejecting his claim. Dickinson v. United States, 74 S. Ct. 152." (Appellant's Brief, page 4).

An examination of appellant's Selective Service File does, however, reflect a factual picture quite different from that portrayed by the appellant. The appellant was initially classified 1-A on September 9, 1964 and subsequently appeared before the Board on August 22, 1964 for a personal appearance (Selective Service File, page 21). It was at this time that the appellant indicated that he was doing part-time work with the church while he was employed full-time as a clerk working for Los Angeles County. After the Board again reclassified the appellant 1-A and after the Appeal Board tentatively determined he should not receive a classification below that of I-O, the file was then forwarded to the Department of Justice pursuant to the applicable regulations.

A hearing was held before a Justice Department hearing officer on June 3, 1965 at Fullerton, California. At this time, the following facts, among others, were presented to the hearing officer: that appellant was active with the Jehovah's Witnesses since 1963, that he was employed by the Los Angeles County Bureau of Public Assistance, and that he regarded the employment as a means to pursue his ultimate vocation as a minister of Jehovah's Witnesses faith. Based on this information, the hearing officer recommended to the Appeal Board that the appellant be classified in Class I-O (Selective Service File, page 30).

It is indeed clear that an appellate court may not interfere with a registrant's classification unless it finds that there is no basis in fact for the classification or that the Local Board acted so arbitrarily and capriciously that the registrant was denied due

An examination of the record clearly reflects a basis in fact for the classification of appellant in Class I-O. It is respectfully submitted that the appellant's full-time employment with the Los Angeles County Bureau of Public Assistance along with his part-time church activities was more than sufficient to permit the hearing officer and the Appeal Board reasonably to conclude the appellant was entitled to no higher classification than that of conscientious objector (Class I-O).

2. APPELLANT WAS PROPERLY ORDERED
TO PERFORM A CIVILIAN WORK
ASSIGNMENT.

Appellant contends that the civilian work to which he was ordered was not appropriate for three reasons: (1) that it was to be performed in his own community, (2) that it did not fit his special abilities and (3) that the work involved duties contrary to his religious beliefs.

As to the first contention, the record will reflect that the appellant was given a choice of three work locations, two of which were in Los Angeles, the remaining one in Atascadero, California (Selective Service File, page 59). Appellant made no reply whatsoever to the letter offering him these choices (Selective Service File, page 61). In his interview with the Local Board on May 10, 1966, appellant stated that he would refuse any and all choices and would rather go to prison than to accept any of them (Selective Service File, page 64). It is submitted that appellant should not now be

heard to allege prejudice because the ultimate work assignment was in his own community, when his previous decision reflected a refusal to work anywhere, either in or out of his community.

Appellant next contends that the work chosen did not fit his special abilities and that he was trained in accounting work. Appellant cites no authorities, and none can be found, for the proposition that a registrant is prejudiced because the available work assignment is not conveniently tailored to his particular educational talents.

Lastly, appellant in his brief states that the work ordered involved duties contrary to his religious beliefs (Appellant's Brief, page 8). The record of trial, however, is devoid of any evidence whatsoever to substantiate such a contention.

Finally, however, the appellee would contend that the appellant should be precluded from objecting to the civilian work assignment on the grounds that he failed to employ or exhaust the administrative procedures for obtaining civilian work acceptable to him. Appellant failed to provide the Board with a list of types of work he was willing to perform as provided in 32 C. F. R. §1660.20(a), although the Board requested him to do so (Selective Service File, pages 52-56). When the Board sent the appellant a letter and offered him three types of civilian work, he made no reply whatsoever (Selective Service File, page 61). Lastly, at a meeting with the Board arranged for the purpose of reaching an agreement on civilian work that the appellant was willing to perform, he made no offer to perform any type of work. On the contrary, he indicated

that he would rather go to prison than perform any such civilian work assignment (Selective Service File, page 64). Such a failure to exhaust administrative remedies by complying with the regulations should preclude appellant from objecting to the Board's selection of suitable civilian work.

See: Badger v. United States, 322 F.2d 902

(9th Cir. 1963);

Shaw v. United States, 264 F.2d 118 (9th Cir. 1959);

Frank v. United States, 236 F.2d 39 (9th Cir. 1956);

Campbell v. United States, 221 F.2d 454

(9th Cir. 1955).

VI

CONCLUSION

For the reasons stated above, it is respectfully submitted that the decision of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Eric A. Nobles
ERIC A. NOBLES

